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October 26, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 Street, NW, Room 222
Washington, DC 20554

Re: *Ex Parte* Comments of the Personal Communications Industry Association, WT Docket No. 96-18

Dear Ms. Roman Salas:

In response to a request from the Chief of the Wireless Telecommunications Bureau, enclosed on behalf of the Personal Communications Industry Association are the original and one copy of its *ex parte* Comments in the above-captioned docket.

Please call me at (202) 429-7245 with any questions concerning this submission,.

Respectfully submitted,

Katherine M. Harris

KMH/rg
Enclosure
cc: Dan Phythyon
Roz Allen
Diane Conley
Kathleen O'Brien Ham
Steve Markendorff
Roger Noel
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the	)	WT Docket No. 96-18
Commission's Rules To Facilitate Future	)	
Development of Paging Systems	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act — Competitive Bidding	)	

EX PARTE COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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EX PARTE COMMENTS REGARDING THE COMMISSION'S MARKET AREA PAGING AND AUCTION RULES (WT DOCKET 96-18)

This document outlines and summarizes PCIA's position on a number of outstanding issues before the Commission in its proceeding to revise the licensing rules for paging frequencies. PCIA's viewpoints have been expressed in written submissions seeking reconsideration of the *Second Report and Order* in this docket and responding to the *Further Notice of Proposed Rulemaking*,[1] and refined in *ex parte* discussions with the staff. In response to a request from the Commission staff, this submission discusses the issues and recommendations of most immediate significance to the paging industry. Attachment A highlights additional important topics addressed in PCIA's reconsideration pleadings and *Further Notice* comments.

I. INTRODUCTION AND SUMMARY

Since 1992, members of the paging industry have advocated geographic licensing for certain paging frequencies to better relate licenses to the marketplace and to reduce administrative burdens for licensees and the FCC. The availability of spectrum to serve a growing customer base is critical to the paging industry, and PCIA and its members have been active participants in this proceeding since its inception. For the last two years, the industry has attempted to work with the Commission in order to craft a regulatory regime that provides as many Americans as possible with messaging services. The paging industry already serves over

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[1] *Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems*, 12 FCC Rcd 2732 (1997) (Second Report and Order and Further Notice of Proposed Rulemaking) ("*Second Report and Order*" and "*Further Notice*").

50 million customers every day.[2] One out of every five Americans uses a pager, and subscribers are signing up daily to support a growth rate of approximately 10 percent a year.[3]

As stated in its Petition for Reconsideration of the *Second Report and Order*, its comments on the *Further Notice*, and its *ex parte* filings, PCIA believes the Commission's rules in this proceeding should strive to serve the public interest by achieving three goals:

- Consistent with the Telecommunications Act, implement a market area licensing scheme that provides the American public with the highest quality messaging services delivered over the widest possible area;
- Implement a market area licensing scheme that reduces administrative burdens for both the Commission and licensees; and
- Transition to this licensing methodology as fairly, efficiently, and effectively as possible.

The Commission's paging auction rules must consider the existence of tremendously competitive, efficient, built and operating incumbent paging networks of all sizes and the service they provide to the public. The focus of the rules should be on the interests of existing paging subscribers and the public in general.

Instead, the effect of the rules adopted in February 1997 is to create potential competition between licensees in the same market on the same frequency in situations where the lion's share of the market is already served by existing operators. The unintended consequence is that customers may not be able to obtain market area services from a single provider (or no provider

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2 Source: PCIA's 1998 Wireless Market Portfolio.

3 Source: *Id.*

at all), and interference concerns will create numerous zones within a market area where signal quality is poor or non-existent.

Moreover, by creating an auction paradigm that allows for phantom exclusivity,[4] the Commission has implemented rules that emphasize competition for paging channels as opposed to competition between providers. Such an approach is out of balance. The paging industry grew and is as highly competitive as it is because providers compete for customers in market areas and not within frequencies. Changes to the existing auction rules can correct this imbalance and create a licensing and auction environment that will meet the goals of government and industry while preserving a competitive model that is a prime example of true competition and a Commission success story.

The recommendations set forth below will achieve those results. By eliminating the potential for "phantom exclusivity" situations and by creating a system that allows built-out incumbent systems to file for licenses before auctions are conducted, the Commission will meet the goals enumerated above.

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[4] As explained below, the Commission's adopted auction rules create unnecessary opportunities for triggering auctions in markets where no opportunity would otherwise practically exist. The Telecommunications Act requires the Commission to avoid creating cases of mutual exclusivity, but by giving applicants the means to bid in every market by the use of "all" boxes on the FCC Form 175 application, auctions become the rule, not the exception.

II. THE COMMISSION'S AUCTION RULES FOR THIS SERVICE MUST PROTECT THE PUBLIC INTEREST IN OBTAINING MESSAGING SERVICE ON A MARKET AREA BASIS

A. The public interest will best be served by the grant of market area licenses in two phases.

The rules adopted by the Commission in this proceeding must necessarily focus on meeting the needs of the public. The Commission's rules for paging service licensing structure and auctions, as well as the steps to transition to that new plan, must minimize disruption to the services currently relied upon by millions of Americans. In addition, the Commission's actions should promote the expeditious and efficient provision of messaging services to unserved areas. Similarly, customers should have access to high quality messaging services throughout a reasonably defined market area, whether in the urban "core," or the suburban and rural "fringes."

Instead of meeting these objectives, however, the Commission's rules in effect promote competition on a single frequency in a single market. The adopted rules enable, if not encourage, the entry of new providers into markets where, absent such rules, it would not make economic sense to engage in such market entry. As PCIA and industry members have demonstrated in numerous *ex parte* presentations, on particular frequencies in certain markets, there is so little "white space" that a new entrant would be unable to build a service area viable system meeting the Commission's criteria for interference protection to be accorded co-channel incumbents in the same and adjacent markets. This is true whether the Commission retains MTAs as the basis for its market area licensing, or instead adopts MEAs as urged by PCIA.

The auctioning of licenses for markets with minimal available white space, where the auction winner is not the incumbent operator already providing service throughout the market,

will result in a decreased quality of service within the service area. Initially, if there are multiple providers using the same channel within a market area, and despite the interference protection to be accorded incumbents, customers will find themselves unable to receive or obtain services throughout the entire market from either licensee. In addition, the presence of multiple providers will create increased levels of interference as new market area licensees seek to shoehorn operations into markets already significantly served. Where the carriers cannot promptly address the problems, the FCC will be burdened by requests for relief. As long as an interference problem remains unresolved, customers will be faced with disruptions in or lack of service from any of the providers.

PCIA also expects a problem with "dead zones" as providers attempt to manage their interference and service contours in order to serve their licensed area without interfering with the other providers' areas. There will be areas between incumbent paging licensees and the geographic area licensees that will not have reliable service. These "dead zones" cannot be covered since a change in the service contour generally would lead to a change in the protected interference contour. In addition, the use of auctions to overlay incumbent operations causes extra complexity to the provision of reliable service to customers because it introduces additional parties for coordination and negotiation, leading to greater operating inefficiencies for the entire market. Moreover, licensees must confront these issues not only at the boundaries between service areas (as appropriately and logically contemplated by these auction rules) but also within their service areas.

In order to take advantage of the nation's existing paging infrastructure as a means of serving previously unserved areas, to provide the largest possible service areas for customers, and to protect existing subscribers from unnecessary disruptions in service, the public interest dictates that the practical and effective solution is to grant a market area license to the incumbent in those markets where new entrants would not be able to operate an economically viable system. PCIA advocates implementation of the two-step process detailed below to achieve this objective. First, in Step 1, incumbents covering a specific and significant percentage of the existing population or geographic area of a defined service area would be permitted to file an application for the market area license. If an incumbent filed an acceptable application and met the qualification standards, it would be granted the market area license. As part of the application process, incumbents would be required to demonstrate compliance with qualification standards by certifying to coverage, construction, and operation of base station facilities and producing maps depicting their coverage. These certifications would be reliable in light of the extensive work performed by licensees and the Commission over the last two years to confirm the accuracy of the database.[5] Moreover, the submission of a false certification would place the licensee at substantial risk of facing a forfeiture or even revocation of its license.

Because the Commission has already established construction benchmarks in its rules, the standards required of incumbent licensees should be consistent with those benchmarks. Thus, for incumbents, the appropriate coverage benchmark should be 70 percent coverage of a market

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[5] *See, e.g., FCC Public Notice*, "Wireless Telecommunications Bureau Makes 929 MHz and 931 MHz Paging Databases Available for Review Prior to Auction," DA 98-684 (April 9, 1998).

area's population or geographic area. That level of coverage *exceeds* the five-year construction benchmark already adopted by the Commission.[6] An operator meeting the 70 percent coverage test is in the best position to serve the remaining area within the market. To ensure service to those areas as soon as possible, to provide customers with the widest service area possible, and to protect existing subscribers from interference, the public interest demands grant of the license to the incumbent operator on that frequency where that licensee serves at least 70 percent of the existing population or geographic area.

Similarly, if multiple incumbents serving a market on a single frequency together cover 70 percent of the population or geographic area, and they wish to seek a joint market area license, they should be permitted jointly to file an application that demonstrates their joint coverage, and receive a market area license on that basis. This would encourage incumbents to leverage their existing infrastructure in order to best provide the public with messaging services.

In Step 2 of this proposed framework, all interested parties would then be invited to file applications for specific market area authorizations on the remaining available frequencies in each market. Mutually exclusive applications would be subject to the Commission's auction rules. PCIA believes that this approach would more effectively serve the public interest because it protects the reliance of existing subscribers on their current service arrangements, enables

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[6] The *Second Report and Order* adopted the requirement that, for each MTA or EA, the geographic area licensee must provide coverage to two-thirds of the population within five years of the license grant. *Second Report and Order*, ¶ 63; 47 C.F.R. § 22.503(k). A geographic licensee also may provide "substantial service" in order to meet the requirements of the rules.

faster delivery of new service to isolated areas, and minimizes the likelihood that unscrupulous parties will use the auction process to disrupt service or extract inappropriate financial benefits.

Although requiring additional application processing in the near term, the proposal would minimize post auction conflicts and introduce services to unserved areas more quickly.

B. The FCC is not required to facilitate opportunities for the filing of mutually exclusive applications.

Adoption of this proposal would be consistent with applicable legal standards, particularly including the *Ashbacker* principle. In *Ashbacker Radio Corp. v. FCC,* the Supreme Court found that Section 309(a) of the Communications Act creates, for applicants, a "statutory right to a hearing . . . before denials of their applications."[7] This *Ashbacker* right to a hearing is not absolute, however. The Supreme Court later clarified in *United States v. Storer* that, when adequately supported by the record, the Commission may establish substantive threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration.[8] The Court noted that the *Ashbacker* requirement does not withdraw "from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business" and "does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to . . . the public interest."[9]

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7 *Ashbacker Radio Corporation v. FCC,* 326 U.S. 327, 330 (1945) (holding that the FCC, when confronted by mutually exclusive applications, may not "grant . . . one of two mutually exclusive applications without a hearing of the other"). The relevant language, residing at the time of *Ashbacker* in Section 309(a), is now contained in Section 309(e).

8 *United States v. Storer Broadcasting Co.,* 351 U.S. 192, 202-203 (1956).

9 *Id.* at 202.

Under the principles enunciated in *Storer*, Section 309 (and the Supreme Court's interpretation thereof) does not limit the Commission's general authority to establish rules consistent with the public interest and spectrum efficiency. PCIA's proposed two-step licensing procedure simply establishes threshold standards, and is consistent with the principles set forth in *Ashbacker*. The Commission has similarly relied on *Storer* in other instances to place reasoned eligibility limitations on applicants for particular licenses. For example, the Commission decided, on the basis of a "strong public interest justification," to permit recipients of pioneer's preferences to file license applications without being subject to competing applications.[10] In reaching this decision, the Commission closely examined the *Ashbacker* question, and concluded that it was not precluded from "establish[ing] threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration."[11]

Moreover, *Ashbacker* applies only to situations where there are mutually exclusive applications actually pending before the Commission, and does not create any rights for *potential* applicants. The D.C. Circuit has recognized precisely this point. In reviewing the FCC's treatment of applications for certain microwave radio station licenses, the court explained that "Ashbacker's teaching applies *not to prospective applicants*, but only to parties whose

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[10] *See Establishment of Procedures To Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3492 (1991) ("*Pioneer's Preference Order*"). Indeed, in the *First Report and Order* in this docket, the Commission recognized that, in *Storer*, "the Supreme Court stated that the Commission may screen applicants for eligibility based on threshold standards, provided the standards are adequately supported by the record in a rulemaking proceeding"). *Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems* (First Report and Order), 11 FCC Rcd 16570, 16584 (1996) (footnote omitted).

[11] *Pioneer's Preference Order*, 6 FCC Rcd at 3492.

applications have been declared mutually exclusive."[12] Thus, *Ashbacker* does not require the Commission to facilitate opportunities for the filing of mutually exclusive applications on the paging frequencies.

C. In fact, the Telecommunications Act obligates the Commission to reduce cases of mutual exclusivity.

In services subject to licensing by means of competitive bidding, the Commission is under an affirmative obligation to seek ways to reduce mutually exclusive submissions. Specifically, Section 309(j)(6)(E) affirms the Commission's "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to *avoid* mutual exclusivity in application and licensing proceedings."[13] The rules established to date in this docket do not reflect any attempt by the Commission to implement this mandate. While PCIA's proposal for 70 percent coverage certification addresses some of these issues, the fundamental and crucial change necessary in the existing rules is to avoid cases of mutual exclusivity caused by the infamous "all" boxes.

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[12] *Reuters v. FCC*, 781 F.2d 946 (D.C. Cir. 1996) (emphasis added). In that case, Reuters appealed the Commission's decision to revoke Reuters' recently-granted microwave radio station licenses, based on the Commission's determination that another applicant had mutually exclusive applications on file at the time that Reuters' licenses had been granted. The court held that the competing applications had, in fact, been filed *after* the Reuters licenses were granted. Accordingly, because *Ashbacker* only protects the rights of parties with applications actually on file, the FCC's determination that *Ashbacker* required it to revoke Reuters' licenses and hold a hearing was flawed. *See id.*

[13] 47 U.S.C. § 309(j)(6)(E) (emphasis added).

The "all" boxes are found on page 1 of FCC Form 175. *See* Attachment B. An applicant may check one "all" box for markets, and another "all" box for frequencies. By checking those boxes on the application, an applicant signals its intent to participate in all the market areas created by a particular services auction rules. While administratively simple, the checking of the "all" boxes by any one applicant effectively renders any and all other applications "mutually exclusive" with the original applicant, regardless of the market or frequency or whether the original applicant had any interest in any particular market. This "phantom exclusivity" created by use of the "all" boxes by the Commission is wholly inconsistent with the agency's 309(j)(6)(E) obligations.

In light of recent Congressional action requiring the Commission to evaluate the appropriateness of reserve or minimum bids,[14] it has become even more legally and practically necessary for the Commission to comply with the mandates of Section 309(j)(6)(E). Specifically, Section 309(j)(1) authorizes the use of competitive bidding for selecting among mutually exclusive applications. Congress did not intend to require payment for licenses not involved in mutual exclusivity. The current structure of the auction rules, combined with the likely imposition of reserve or minimum bids, means that applicants for licenses that are not legitimately mutually exclusive with any other application nonetheless will have to pay funds to the U.S. Treasury. In order to bring the paging auction rules into conformance with Section 309,

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[14] 47 U.S.C. 309(j)(4)(F).

the Commission must look for ways (like the process proposed above) to minimize phantom exclusivity.

D. The 800 MHz SMR auction experience is inapplicable to paging market area licensing.

PCIA consistently opposed elements of the auction rules for 800 MHz SMR systems, arguing that overlay auctions for incumbent competitive services presented an unfair and inefficient licensing assignment scheme. Despite conclusion of the auction of the upper 200 800 MHz SMR paging channels, the SMR auction rules are still subject to challenge by several parties.

Even if the Commission and the courts determine the legality of proceeding with additional SMR auctions, those actions do not justify a similar result for paging auctions. First, in contrast to the upper 200 800 MHz SMR channels, each paging license represents a single frequency, and not multiple frequencies. Therefore, allowing multiple providers to serve a single market area on the same frequency will create unacceptable interference problems and a concomitant reduction in the quality of end-user service. Second, the Commission does not contemplate relocating paging service incumbents, contrary to its upper channel 800 MHz SMR plan. Thus, new entrants in markets with the extensive incumbency outlined above will not be in a position to meet the Commission's construction requirements. Third, the paging industry lacks a single dominant player like Nextel, Inc., but instead has many viable service providers today meeting the needs of their customers.

E. The FCC's hybrid auction stopping rule is an ineffective alternative to narrowing the scope of the paging auctions consistent with the public interest.

Finally, PCIA appreciates the Commission's attempt to address paging industry concerns through adopting a hybrid auction stopping rule that is unique to this service. Unfortunately, this approach is ineffective and does not address the fundamental public interest concerns described above. In particular, no market area license will be granted until the Commission at minimum accepts applications for the auction and determines if mutually exclusive applications are filed. If any entity has checked the "all" boxes, each incumbent must participate in the auction itself for at least one month, and then must endure the period of time necessary to process and grant the winning applications prior to initiating service. Thus, licensees will still be tied up in preparing for and participating in auctions under the Commission's newly adopted procedural rules for a considerable period of time in addition to being forced to endure administrative proceedings that are unnecessary and not in the public interest.

III. THE COMMISSION OTHERWISE NEEDS TO REVISE ITS AUCTION PROCEDURES IN SEVERAL SIGNIFICANT RESPECTS

In addition to allowing incumbents serving 70 percent or more of their markets to certify, apply, and obtain market area licenses prior to soliciting mutually exclusive applications, the Commission also needs to make several other significant changes to its auction rules. First, the Commission should eliminate the availability of the "all" boxes from the application form (FCC Form 175) and instead require applicants to specify the particular frequency/market combinations for which they are seeking a license. This change is important because phantom

exclusivity created by the "all" boxes is illegal under Section 309(j)(6)(E) of the Communications Act, as amended. The easy ability simply to check the "all" boxes will likely create mutually exclusive situations where they do not actually exist.[15] The availability of the "all" boxes also has the deleterious effect of permitting entities to sign up to bid even without giving serious thought to each and every system they are seeking authorization to construct and operate.

Second, applicants should be required to post an upfront payment for each and every license on which they seek to bid. Requiring a per license upfront payment will help to ensure that auction participants are sincere in their participation and their intent to provide service to the public. This approach also would help to deter the activities of fraudulent application mills by requiring a greater financial investment.

Third, the Commission should provide complete bidding information, specifically including the identity of competing bidders to all parties, during the course of the auctions. The Commission's decision to withhold significant identification information from applicants is inconsistent with its usual, and well-founded, approach to maximizing information flow related to auctions. Further, the existing policy likely will place incumbents at a disadvantage vis-à-vis their competitors, because competitors will know which licenses are important to an incumbent's

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[15] The Commission can implement this change without having to alter the Form 175. In the decision acting on the petitions for reconsideration, or a separate public notice, the Commission could simply declare that, for purposes of applying for paging geographic area licenses, the "all" boxes may not be used in designating the markets and frequencies encompassed by an entity's application.

business plan, but incumbents will have no analogous knowledge of their competitors' licensing needs.

Fourth, the Commission should not permit a "substantial service" alternative for market area licensees to meet applicable coverage requirements because the test is irrelevant for incumbent operators in most license areas, as they already offer service to the public. In addition, for new entrants, the "substantial service" alternative provides the incentive and opportunity for both speculators and fraudulent application mills to take advantage of the Commission's auction process at the expense of the public interest. Finally, in the absence of specific construction benchmarks, service to the public may be delayed, or the holder of the market area license simply may use its license to block expansion by incumbent operators in the market as well as in adjacent service areas.

IV. PCIA ENDORSES COMMISSION EFFORTS TO ADOPT POLICIES TO REDUCE FRAUDULENT ACTIVITY IN THE SHARED PAGING CHANNELS

PCIA agrees with the Commission that a number of steps should be taken to reduce fraudulent activity in the shared channels. The FCC's proposed changes to the Form 600 (and its subsequent efforts regarding Form 601 and the Universal Licensing System procedures) are a good starting point, although language changes alone are insufficient to deter fraud. In particular, application and build-out mills are able to thrive largely due to the lack of clear, definitive information from the FCC on licensing, construction, assignment of licenses, management agreements, and frequency availability. The FCC should therefore prepare and issue Public Notices concerning those issues, not specifically detailed in the rules, that are

typically the subject of misleading statements by application mills. In order to get this information out to the public as quickly as possible, PCIA is willing to undertake a role in this education process.

Similarly, through its frequency coordination processes, PCIA has already taken steps to provide applicants with more information. Specifically, upon receiving an application, PCIA sends applicants and contact representatives postcards indicating that the application has been received and giving them a PCIA file number. Further, once frequency coordination has been completed, PCIA sends the applicant and contact representative confirmation that coordination has been completed and information about the assigned frequency. Unfortunately, these avenues will not be available in an auction environment because frequency coordination will not be required prior to the submission and grant of market area licenses.

Another means by which the FCC can help to reduce application fraud is by making two modifications to the Form 800A construction letter. First, in order to prevent the confusion that helps make application fraud possible, the Commission should only issue these construction letters when the newly issued license necessitates a new construction obligation. Second, because the licensee is often not the entity that performed the actual construction of the station, the Commission should require both the licensee *and* the entity that performed the construction (if different from the licensee) to sign the portion of the Form 800A attesting that the construction was completed.

V. CONCLUSION

The Commission has an opportunity to modify its rules and craft a market area licensing scheme that provides the American public with high-quality messaging services over the largest possible footprint including existing *and* currently unserved areas. In order to achieve these goals, the Commission should (1) allow incumbent paging providers covering 70 percent of the existing population or geographic area of a market area to be granted the market area license, (2) eliminate the FCC Form 175 "all" boxes, and (3) make other substantial procedural and logistical changes to ensure that all applicants are treated fairly. By taking advantage of the nation's existing messaging infrastructure in this manner, the Commission will have established a regulatory framework for the paging industry that best serves the communications needs of the American people.

ATTACHMENT A

ADDITIONAL MATTERS RAISED BY PCIA ON RECONSIDERATION OF THE *SECOND REPORT AND ORDER* IN WT DOCKET 96-18

In addition to the subjects discussed in the foregoing statement, PCIA has sought reconsideration of a number of other actions taken in the Commission's *Second Report and Order* in this docket. These matters are outlined in the two sections below.

I. THE PAGING AUCTION RULES SHOULD BE REVISED IN ADDITIONAL RESPECTS

In addition to the aforementioned suggested changes in the Commission's auction rules and policies, PCIA requests that a number of other rules and policies be changed:

- The Commission should hold auctions for the lower band frequencies first, followed by auctions for the 929/931 MHz frequencies. This action is in the public interest because many of the carriers operating on the lower band frequencies are smaller businesses that do not have the economic strength to tolerate the extended application freeze that will affect them if the Commission begins by auctioning the 929/931 MHz frequencies.

- The Commission should replace MTAs with MEAs as the basis of the geographic license areas for exclusive 929 and 931 MHz frequencies because: (1) EAs are used in the lower bands that are subject to geographic licensing and MEAs for the 929 and 931 MHz frequencies will provide greater service area parallelism; (2) MEAs are a reasonable definition of market areas recently established by the Commission; and (3) use of MEAs avoids the need for royalty payments to Rand McNally.

- Due to the special characteristics of the paging industry, bidding credits and installment payments for designated entities are unnecessary. In particular, many licenses should be of interest only to incumbents, a number of which are small businesses. Further, small businesses already have an opportunity to participate in the paging business, which is less capital intensive than broadband CMRS, and partitioning will open additional opportunities for small businesses. Also, the use of EAs in some paging bands provides opportunities for small businesses. In contrast, bidding credits and installment payment plans can undermine the fairness and effectiveness of the auction.

- The Commission should establish a safe harbor from the anti-collusion rules for carriers engaged in acquisition negotiations or inter-carrier agreements concurrently with the acquisition of new spectrum at auction. Significantly for the public interest, licensees must often engage in discussions to prevent interference or implement coordinated service arrangements for the benefit of their customers, and these discussions, though not targeting at collusive behavior during auctions, might have indirect implications sufficient to raise questions under the collusion rules.

- In order to put teeth into its build out rules, the Commission should clarify that all facilities constructed pursuant to a grant of a geographic area license must be terminated if the licensee fails to meet applicable coverage requirements.

II. THE COMMISSION SHOULD CHANGE CERTAIN OTHER ASPECTS OF ITS RULES TO ENSURE THAT APPLICANTS AND INCUMBENTS ARE TREATED FAIRLY AND CONSISTENTLY

The Commission should make a number of rule and policy changes to ensure the fair and consistent treatment of incumbents and new entrants:

- In the *Second Report and Order*, the Commission attempted to grant existing operators full co-channel protection from new market area licensees. In making this commendable effort, however, the Commission provided the same interference protection to exclusive 929 MHz channel systems and non-exclusive 929 MHz operations on the exclusive channels. This resulted in certain licensees operating on the exclusive 929 MHz channels that did not obtain exclusivity for their system being granted exclusivity vis-a-vis the market area licensee. In order to remedy this anomaly, the Commission should revise its rules to take away this grant of *de facto* exclusivity from licensees that did not earn such status.

- Rather than dismissing all pending applications, the Commission should process those applications pending as of February 19, 1997 (the date the *Second Report and Order* was adopted), under the rules in effect prior to the adoption of the *Second Report and Order*. The retroactive application of the rules contained in the *Second Report and Order* will frustrate the reasonable expectations of many applicants whose applications have been pending for a number of years, and which would have been processed but for the backlog of applications pending before the Commission.

- Because the Commission has already determined that existing nationwide licensees *have* built out their systems and *have not* engaged in spectrum warehousing, there is no reason at this time to impose additional build out requirements on nationwide licensees. In addition, because nationwide licensees have already made construction decisions and allocated resources based on the existing buildout schedule and market conditions, any contradictory Commission mandates could be counter-productive by potentially disrupting services relied upon by the public.

- Nationwide licensees should have the same rights to partition as geographic licensees in MTAs and EAs, but all partitioning rules should safeguard against sham arrangements that are intended to evade the Commission's build out requirements. PCIA has consistently favored partitioning because it is a valuable means of providing geographic and service flexibility for all geographic licensees. Nevertheless, the Commission's rules must ensure that all partitioning arrangements have a *bona fide* business purpose, and are not sham transactions designed to circumvent the Commission's build out rules. To this end, both the partitioner and partitionee should bear responsibility for meeting the Commission's build out requirements.

- The Commission should not, at present, permit spectrum disaggregation in the paging channels because it is neither technically nor practically feasible. Technically, the risk of interference increases as channels are disaggregated, especially if the channel size is smaller than 25 kHz. Practically, the more any spectral band is subdivided, the less economically viable uses can be found for the spectrum, at least in the bandwidths currently available for paging services.

ATTACHMENT B

Form 175

Federal Communications Commission
Washington, D. C. 20554

Application to Participate in an FCC Auction
(Read Instructions on Back Before Completing)

Special Use				
FCC Use Only				

OMB Approval 3060-0600

Estimated Average Burden
Per Response: 45 Minutes

1. Applicant

8. Applicant Classification: ☐ Individual ☐ Joint Venture ☐ Partnership ☐ Trust ☐ Corporation ☐ Consortium ☐ Association ☐ LLC ☐ Govt. Entity

2. Mail Address (No P.O Boxes)

9. Reserved for FCC Use Only

10. Applicant Status:
☐ Small Business ☐ None
___% Bidding Credit Eligibility
☐ Rural telephone company
☐ Minority owned business
☐ Woman owned business

3. City | 4. State | 5. ZIP Code

6. Auction Number | 7. Taxpayer Identification No.

11. Markets and Frequency Blocks /Channels for which you want to bid. If more than 5 markets, use supplemental form (FCC 175-S).

	Market No. ALL ☐	Frequency Block/Channel No. Enter Frequency Block /Channel Number(s) or Letter(s) or Check All ALL ☐
(a)		
(b)		
(c)		
(d)		
(e)		

☐ Check here if supplemental forms 175-S are attached. Indicate number of supplemental forms 175-S attached: _____

☐ Check here if exhibits are attached. Indicate number of supplemental exhibits attached: _____

12. Person(s) authorized to make or withdraw a bid (Typed/Printed Name)

(a) | (b) | (c)

Certification: I certify the following:

(1) that the applicant is legally, technically, financially and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules and is in compliance with the foreign ownership provisions contained in Section 310 of the Communications Act.

(2) that the applicant is the real party in interest in this application and that there are no agreements or understandings other than those specified in this application (see Instructions for certification), which provide that someone other than the applicant shall have an interest in the license.

(3) that the applicant is aware that, if upon Commission inspection, this application is shown to be defective, the application may be dismissed without further consideration, and certain fees forfeited. Other penalties may also apply.

(4) that the applicant has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in this application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid.

(5) that the applicant, or any party to this application, is not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.

(6) that, if applicant status is claimed in block 10, the applicant is eligible for any special provisions set forth in the Commission's Rules applicable to this auction and consents to audits, as set forth in the Commission's Rules, to verify such status.

(7) that the applicant is and will, during the pendency of its application(s), remain in compliance with any service specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications.

(8) that the applicant is not in default on any payment for Commission licenses and that it is not delinquent on any non-tax debt owed to any federal agency.

I declare, under penalties of perjury, that I am an authorized representative of the above-named applicant for the license(s) specified above, that I have read the instructions and the foregoing certification and all matters and things stated in this application and attachments, including exhibits, are true and correct.

Typed/Printed Name of Person Certifying	Title of Person Certifying	Date
	Contact Person	Telephone No.
Signature of Person Certifying (Blue Ink ONLY)	E-mail address	FAX No.

Willful false statements made on this form are punishable by fine and/or imprisonment (U.S. Code, Title 18, Section 1001), and/or revocation of any station license or construction permit (U.S. Code, Title 47, Section 312(a)(1)), and/or forfeiture (U.S. Code, Title 47, Section 503).